OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Tom L. Beauchamp
Secretary of State
Austin, Texas

Dear Sir: Attention: Mr. Ennis C. Favors
Attorney, Franchise Tax Division

Opinion No. O-1331
Re: Should the Secretary of State collect a franchise tax from motor bus and motor truck corporations operating over fixed lines and at fixed schedules under the terms and provisions of Article 7084 (A), R. C. S., or under the terms and provisions of Article 7084 (D), R. C. S.?

We are in receipt of your letter of September 26, 1939, which reads in part as follows:

"We have a number of motor bus and motor freight truck corporations operating in Texas over fixed lines and at fixed schedules. Some of these corporations file their franchise tax returns as a public utility corporation, under the provisions of Article 7084d thereby avoiding the payment of any tax upon their notes, bonds and debentures maturing one year or more from date of issue, others file their franchise tax under the terms and provisions of Article 7084a, R. C. S., thereby paying taxes on their notes, bonds and debentures maturing one year or more from date of issue. We will appreciate your opinion on the following question:

> "Should the Secretary of State collect a franchise tax from these motor bus and motor truck corporations operating over fixed lines and at fixed schedules under the terms and provisions of Article 7084a, R. C. S., or under the terms and provisions of Article 7084d, R. C. S.?"

As we understand your question, you refer to those motor bus and truck corporations operating under certificates of public convenience and necessity issued by the Railroad Commission of Texas, and which are ordinarily designated as "common carriers."

Article 7084 (A) is the general franchise tax statute which applies to "every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas." Subdivision (D) of Article 7084 removes certain corporations from the operation of Section (A), and the tax is computed upon a different basis. Subdivision (D) reads in part as follows:

> "(D) Except as provided in preceding Clauses (B) and (C) all public utility corporations, which shall include every such corporation engaged solely in the business of a public utility whose rates or service is regulated, or subject to regulation in whole or in part, by law, shall pay a franchise tax as provided in this Act. * * *"

In construing this statute, the Austin Court of Civil Appeals stated in Gulf States Utilities Company v. State, 46 S. W. (2d) 1018:

> "* * * Under the language of subdivision (D) only 'public utility corporations, which shall include every such corporation engaged solely in the

> business of a public utility whose rates or service is regulated, or subject to regulation, in whole or in part, by law,' are included. It is manifest from this language that the Legislature did not intend to include within the statute any corporation which it had not theretofore, or might thereafter, declare to be 'by law' a public utility corporation or business. The phrase 'every such corporation' is necessarily limited to 'all public utility corporations' declared to be such 'by law,' which means, as applied here, by a legislative enactment. If the language may be regarded as of doubtful meaning in this regard, then we think that such construction is manifestly the intention of the Legislature from its long-continued policy of enacting from time to time declaratory statutes, declaring businesses or enterprises to be public utilities, or to be affected with the public interest, and in subjecting them to some sort of public regulation or control. * * **

A public utility has been described as a business organization, which regularly supplies the public with some commodity or service, as electricity, gas, water, transportation, telephone or telegraph service. While the term has not been exactly defined, and it would be difficult to construct a definition that would fit every conceivable case, the distinguishing characteristic of a public utility is the devotion of private property by the owner or person in control thereof, to such a use that the public generally has the right to demand that the use or service shall be conducted with reasonable efficiency and under proper charges. 51 C. J. 4; 44 Tex. Juris. 702.

With reference to the motor bus companies described in your letter of request, the Legislature has made numerous regulations in what is now designated as Article 911a, Vernon's Texas Civil Statutes, being Acts of 1927, 40th Legislature, Chapter 270, as amended Acts of 1929, 41st Legislature, First Called Session,

Chapter 78. It is provided in Section 2 of said Act that:

> "All motor bus companies as defined herein are hereby declared to be 'common carriers' and subject to regulation by the State of Texas, and shall not operate any motor propelled passenger vehicle for the regular transportation of persons as passengers for compensation or hire over any public highway of this state, except in accordance with the provisions of this Act * * *."

Section 3 makes it the duty of the Railroad Commission to issue certificates of public convenience and necessity, pursuant to a finding that public convenience and necessity required the issuance of such certificate and that its issuance will promote the public welfare.

Section 4 makes it the duty of the Railroad Commission to supervise and regulate the public service rendered by every motor bus company operating over the highways over this state, fix fares, rates or charges, prescribe rules and regulations, prescribe routes, schedules, service and safety operations.

Throughout the Act various and detailed regulations are imposed upon such motor bus companies, which we do not deem necessary to set out at length.

Acts 1929, 41st Legislature, Chapter 314, as amended by Acts 1931, 42nd Legislature, Chapter 277, appearing as Article 911b, Vernon's Texas Civil Statutes, 1925, subjects the motor carriers described in your letter of request to regulation and places them under the supervision and jurisdiction of the Railroad Commission of Texas. Section 22b of such Act provides in part as follows:

> "The business of operating as a motor carrier of property for hire along the highways of this State, is declared to be a business affected with the public interest.* * *"

Section 3 provides that no "motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation. * * *"

Section 4 makes it the duty of the Railroad Commission to supervise and regulate such carriers and to fix, prescribe or approve rates, fares and charges, to prescribe rules and regulations, require reports, prescribe schedules and services and to supervise and regulate motor carriers in all matters affecting the relation between such carriers and the shipping public, whether therein specifically mentioned or not. The Act then proceeds to prescribe regulations and define the duties of the Commission in greater detail.

The whole tenor of the Acts mentioned above indicates that the welfare of the public is a matter of first consideration, and that the Railroad Commission should fully consider the need and effective service rendered to the public. Texas Motor Coaches v. Railroad Commission (T. C. A., 1931), 41 S. W. (2d) 1074.

In Producers Transportation Company v. Railroad Commission of the State of California (1920), 251 U. S. 228, 40 Sup. Ct., 131, it was stated:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause

> of the Fourteenth Amendment. * * * On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility, and its owner a common carrier whose rates and practices are subject to public regulation."

See also Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 45 Sup. Ct. 191, wherein motor carriers were under consideration.

We also call attention to West Suburban Transportation Company v. Chicago and West Town Railway Company, 140 N. E. 56:

> "It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that Act is that, through regulation of an established carrier occupying a given field and protecting it from competition, it may be able to serve the public more efficiently and at a more reasonable rate than would be the case if other competing lines were authorized to serve the public in the same territory. Methods for the transportation of persons are established and operated by private capital as an investment, but as they are public utilities, the State has the right to regulate them and their charges, so long as such regulation is reasonable."

It is our opinion that corporations engaged solely in the business of operating common carrier motor buses and motor trucks in transporting persons or property should pay a corporate franchise tax under the terms and provisions

of Article 7084 (D), Revised Civil Statutes, 1925, as amended.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Cecil C. Cammack
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Assistant

CCC:LW

APPROVEDNOV 1, 1939

Gerald C. Mann

ATTORNEY GENERAL OF TEXAS